84-1618

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

GARY ALAN KOPCZYNSKI,
Petitioner,

vs.

THE JACQUELINE, DOCUMENTATION No. 519060,
HER ENGINE, TACKLE, APPURTENANCES,
ETC., IN REM,
SEAWARD MARINE SERVICES, INC.,
et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI — JONES ACT CLAIM FROM THE COURT OF APPEALS UNITED STATES DISTRICT COURT NINTH CIRCUIT

JEFFREY A. KOPCZYNSKI
1025 N. Brand Boulevard,
Suite 310
Glendale, California 91202
Telephone (818) 500-1631

Attorney for Petitioner
Gary Alan Kopczynski

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

54PP

QUESTIONS PRESENTED

1. Whether the Occupational Safety and Health Act has jurisdiction to regulate the working conditions of employees aboard uninspected vessels? Or, whether, under Section 4(b) of the O.S.H. Act, the regulatory authority of the Coast Guard in Maritime matters preempts O.S.H.A.'s statutory authority to regulate a hazard aboard a vessel not addressed by the Coast Guard?

More specifically, in the instant case, whether the Defendants, Seaward Marine Services, violation of Title 29, C.F.R. Chapter 17, Safety and Health Standards for Maritime Employment, Subsection 1915.44, (subsequently redesignated 1915.74) "access to vessels" precludes the imposition of comparative negligence on Plaintiff as per 45 U.S.C. § 51, et seq., (the Federal Employer's Liability Act) as incorporated by 46 U.S.C. §§ 688, et al. (the Jones Act).

Prior to deciding the questions presented hereinabove, a preliminary question regarding the interpretation of Section 4(b)(1) of the O.S.H. Act, 29 U.S.C. § 653(b)(1) (1982), is necessary to determine whether Section 4(b)(1) requires an actual exercise of delegated statutory authority. If so, then the absence of an actual exercise of regulatory authority, i.e., the regulation of boarding or departure procedures pertaining to uninspected vessels, would necessitate the applicability of O.S.H.A. regulations to prevent a twilight zone of nonregulated activities.

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D. Plaintiff's marked for Exhibit as No. 62, Code of Federal Regulations, Title 29, Chapter XVII, Occupational Safety and Health Administration, Subsections 1915.4 — Definitions and 1915.74 — Access to Vessels D-1

E. Plaintiff's marked for Exhibit as No. 62, Code of Federal Regulations, Title 32, Section XII — Contractor Industrial Labor Relations, Subsection 12-000 — Scope of Section, Subsection 12-501 — Safety and Health Regulations and Subsection 12-502 — Applicability E-1

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 742 F.2d 555 (1984).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on September 11, 1984, and a copy therof is appended to this Petition in the Appendix. Further, the order of the Court of Appeals for the Ninth Circuit denying a Petition for Rehearing was made and entered on January 10, 1985, and a copy thereof is appended to this Petition in the Appendix.

The statutory basis for the Federal Court jurisdiction is based on 46 U.S.C. §§ 688, et al., and 45 U.S.C. §§ 51, et seq.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The trial of this case involved the following facts. Plaintiff, Gary Alan Kopczynski, was employed by Seaward Marine Services as a Diver/Tender. His duties as a Diver/Tender included specifically, working aboard the vessel, The Jacqueline, and performing all duties aboard the Jacqueline, as well as those duties directly connected to the cleaning operations of the Jacqueline and Seaward Marine Services.

On August 25, 1981, the Jacqueline was moored to the fuel dock in San Diego Harbor. At this point in time, Plaintiff was assisting in the refueling operations of said vessel. This included, though was not limited to, emptying certain 55 gallon drums of fuel and/or hydraulic oil that had been stored on the decks of the Jacqueline.

At the time of the incident giving rise to the original complaint, due to the tide, the aft-work deck of the Jacqueline was six to eight feet below the surface level of the dock.

At periods of low or mean tide, due to the discrepancy between the aft-work deck of the Jacqueline and the surface level of the dock, the customary means of access between the aft-work deck of the Jacqueline and the dock involved climbing up onto the safety railing of the Jacqueline and lifting oneself out onto the surface of the dock. No gangways, ladders or Jacob ladders were provided by the Defendants to assist Plaintiff in the performance of his duties.

Plaintiff, while involved in the off loading procedure, was standing on the safety rail of the vessel when he slipped and fell, thereby suffering the injuries complained of.

Plaintiff could not have carried out his orders to off load the 55 gallon drums without standing on the rail. This was a customary procedure when the tide caused the aft-work deck to be lower than the surface level of the dock.

On February 5, 1982, Plaintiff filed a complaint against the Defendant under the laws of admiralty, as modified by the Jones Act, 46 U.S.C. § 688, for the injuries resulting from the shipboard accident occurring on August 25, 1981.

The case was tried on June 21, 1983, before a jury in the United States District Court, Southern District of California. A jury verdict was returned for Plaintiff on July 12, 1983, in the amount of: $692,308.00 — compensatory damages; $55,301.00 — maintenance and cure; and, $325,000 — punitive damages. The compensatory damages, however, were reduced by 35% for comparative negligence of Plaintiff.

Notice of Appeal was filed by the Defendants on August 8, 1983, and Notice of Cross-Appeal by Plaintiff was filed on August 19, 1983, appealing from the judgment, and orders entered by the trial court.

The decision of the United States Court of Appeals Ninth Circuit upheld the applicability of comparative negligence and reversed the award of punitive damages, finding them inapplicable.

ARGUMENT

A Petition for Rehearing was made by Plaintiff/Appellant on the issue of the applicability of comparative negligence wherein the Defendants violated the Federal Employers Liability Act (FELA) as incorporated by the Jones Act.

Section 53 of the FELA provides in part:

> "No such employee (of a common carrier by railroad) who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The OSHA shipyard employment regulations, more specifically, 29 C.F.R. § 1915.74, promulgated under the authority of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 provides in part that:

> "The employer shall not permit employees to board or leave any vessel, except a barge or river towboat, until the following requirements have been met: (1) Whenever practicable, a gangway of not less than 20 inches walking surface, of adequate strength, maintained in safe repair and safely secured shall be used. If a gangway is not practicable, a substantial straight ladder, extending at least 36 inches above the upper landing surface and adequately secured against shifting or slipping shall be provided. When conditions are such that neither a gangway nor a straight ladder can be used, a Jacobs ladder meeting the requirements of paragraph (d)(1) and (2) of this section may be used."

The Defendants stipulated in the Pretrial Conference Order to being in violation of the requirements hereinabove set forth. Further, the testimony of crew members and

supervisors directly involved with the Jacqueline confirms the absence of any gangway, ladder, Jacobs ladder or similar appliance to be used in safely entering or leaving the Jacqueline.

The Defendants, however, have argued that the above cited safety regulations are not applicable to this case. They argue that Title 29, Code of Federal Regulations was enacted to protect individuals employed as longshoremen and not seamen. Further, although Plaintiff performed many duties for the Defendants while employed by them, because he was designated a seaman, he is not entitled to the same health and safety protections afforded other employees in the same maritime industry performing the same duties.

In addition to denying the applicability of OSHA regulations at trial, the Defendants argued that: Because the United States Coast Guard retains regulatory power over the working conditions of seamen; and, because The Jacqueline is an uninspected vessel, no specific Coast Guard regulations are applicable to the case herein.

The issue as to the applicability of the safety statutes and the preclusion of any consideration of Plaintiff's comparative negligence was raised at several times during the pretrial proceedings and at the trial of this case. Prior to trial, Plaintiff's counsel moved the Trial Court In Limine, to preclude the Defendants from raising the issue of comparative negligence based on their violation of safety standards applicable to Plaintiff. The trial court denied the motion. During the trial, Plaintiff attempted to introduce evidence regarding the applicability of these safety statutes and said evidence was precluded by ruling of the trial court. At the close of Plaintiff's case in chief, Plaintiff on July 6, 1983, made a Motion for a Directed Verdict on the issues of contributory negligence. Said motion was denied. During

the presentation of jury instructions, Plaintiff's counsel requested that jury instructions Numbers 74, 75 and 76 be given to the jury. These instructions relative to the applicability and existence of safety statutes were denied. Finally, after final argument, Plaintiff's counsel again objected to the issue of comparative negligence going before the jury. The Trial Judge, by this time aware of Plaintiff's position, nevertheless instructed the jury on the issue of comparative negligence.

If Federal OSHA is divested of jurisdiction to regulate the working conditions of seamen abroad uninspected vessels, there will be no governmental agency regulating the safety of employees aboard said vessels. Further, if Federal OSHA is divested of jurisdiction to regulate the working conditions of seamen aboard uninspected vessels, this may result in numerous unnecessary injuries and even deaths.

If the present Ninth Circuit decision in this matter regarding the Coast Guard jurisdiction is allowed to stand and interpreted to mean that OSHA has no jurisdiction with respect to uninspected vessels, a twilight zone of non-regulation will exist into which will fall unprotected employees.

The seriousness of the present situation is supported by the facts and judicial reasoning behind the case of *Donovan v. Red Star Marine Services, Inc.*, 739 Fed. 2d 774 (2nd Cir. 1984), a copy of which is appended hereto. This case was decided just four weeks after the instant case, arose out of facts and circumstances similar yet, reached a different conclusion. In said case, the Court upheld the applicability of OSHA regulations to uninspected vessels. The Court found that the Coast Guard does not exercise and has not exercised any statutory authority vis-a-vis the work place of employees aboard uninspected vessels. *Red Star, supra,*

at 777. The Court further found that, in spite of numerous requests by the Coast Guard to obtain additional grants of authority from Congress in order to regulate more comprehensibly the uninspected fleet, the Coast Guard is limited to regulation of life-saving and firefighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators. *Red Star, supra,* at 777.

Finally, reviewing Supreme Court Rules, Rule 17, Considerations Governing Review on Certiorari, it is stated that the first reason important enough for the Supreme Court to consider granting a review is "(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter;".

In the instant case, we have this very same situation. It is our belief that the Second Circuit has correctly analyzed both sides of the issue. The opinion therein was based on well documented evidence and accurately reflects the magnitude of the problem and the only plausible solution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition should be granted.

Dated: April 2, 1985

JEFFREY A. KOPCZYNSKI

Attorney for Petitioner

APPENDIX A

OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY ALAN KOPCZYNSKI,
Plaintiff-Appellee/Cross-Appellant,

v.

THE JACQUELINE, Documentation Number 519060,
Her Engine, Tackle, Appurtenances, etc.,
In Rem; SEWARD MARINE SERVICES, INC.,
a California Corporation,
SEAWARD MARINE SERVICES, INC.,
a Virginia Corporation,
ABC DOE CORPORATION, WENDY WEBBER,
JIM WALKER and TIM ORSAC,
individually, In Personam,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of California
The Honorable Edward J. Schwartz, Presiding
Argued and submitted July 3, 1984

FILED SEPTEMBER 11, 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals
Nos. 83-6108, 83-6152
D.C. No. CV 82-0123-S(I)

Before: ANDERSON, TANG, and FERGUSON, Circuit Judges. J. BLAINE ANDERSON, Circuit Judge:

Gary Kopczynski brought an admiralty action against Seaward Marine Services for injury he sustained while employed as a crew member on The Jacqueline. Claims were brought for negligence under the Jones Act, 46 U.S.C. § 688, unseaworthiness, maintenance and cure, and punitive

damages. The jury found in Kopczynski's favor on all but the unseaworthiness claim. Seaward appeals claiming that punitive damages are not recoverable under the Jones Act. Kopczynski cross-appeals asserting that his Jones Act award should not have been reduced by the amount of his comparative negligence; the district court should have found The Jacqueline unseaworthy as a matter of law; and attorney's fees should have been awarded as an item of maintenance and cure. We affirm on all issues except the district court's award of punitive damages, which we reverse.

I

BACKGROUND

Kopczynski was employed by Seaward as a "diver/tender" on The Jacqueline. The Jacqueline is a converted World War II landing craft used in connection with ship husbandry, in particular cleaning and maintaining ships' hulls. Kopczynski's duties included underwater inspection and operation of hull scrubbing equipment, assisting other divers, operation of the various specialized machinery on The Jacqueline, and performance of seaman's duties on the vessel such as piloting and maintenance.

On August 25, 1981, The Jacqueline was moored at the Shell Fuel Dock in San Diego Harbor. Kopczynski was assisting in refueling operations. This task included emptying 55-gallon drums containing hydraulic oil and other fuel into the ships' tanks. Once empty, the drums were man-handled back onto the dock.

On the day of refueling, the tide was exceptionally low. This placed the aft work deck, from which the operation took place, six to eight feet below the dock. Due to the transfer of oil from the drums, oil was on the deck, creating slippery working conditions. Either to off-load a drum or to get up on the dock, Kopczynski stood on the safety rail-

ing located four feet above the deck. He slipped, straddled the rail, and injured his back. Using the safety railing to step off of the vessel was a common practice of The Jacqueline's crew.

At first being considered a harbor worker, Kopczynski received over $17,000 in longshoremen's benefits over a 10-month period. On February 5, 1982, Kopczynski filed this action. His complaint sought redress based on the maritime rights of seamen, and his workers' compensation benefits were terminated four months later.

The trial was held in June and July of 1983. On July 12, the jury returned special verdicts finding Seaward negligent, awarding $450,000 in compensatory damages to Kopczynski after his 35% comparative negligence was taken into account; it awarded $55,301 on the maintenance and cure claim; and it concluded that Seaward had acted wantonly and maliciously and granted $325,000 in punitive damages. The jury did not find the vessel unseaworthy. The court entered judgment accordingly.

II

ANALYSIS

A. *Comparative Negligence*

Kopczynski contends that the district court should not have reduced his compensatory damage award under the Jones Act by the amount the jury found him to be comparatively negligent, 35%. We disagree.

The Jones Act provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law

> right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C. § 688. The relevant statutes governing personal injury suits by railway employees, and thus incorporated into the Jones Act, are found in the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60. *See, e.g., Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 79 (9th Cir. 1983).

The general rule in personal injury actions brought in admiralty (both under the Jones Act and general maritime law) and under the FELA is that contributory negligence is not a complete bar to recovery but it does operate to reduce the amount of the damage award. 45 U.S.C. § 53; *see Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 428-429 (1939); *DuBose v. Matson Navigation Co.*, 403 F.2d 875, 878 (9th Cir. 1968).

Section 53 of the FELA also provides that contributory negligence, or more appropriately in today's terms, comparative negligence, may not be considered "in any case where the violation by [the employer] of any statute enacted for the safety of employees contributed to the injury or death of such employee." *See Kernan v. American Dredging Co.*, 355 U.S. 426, 435 (1958) (citing *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949)). Kopczynski argues that Seaward's violation of certain safety regulations contributed to his injury, and therefore his comparative negligence should not have reduced his damage award.

Surprisingly, there is little case law construing the effect of § 53 in maritime personal injury action. In one of the few cases that addressed the issue, the court stated that if a maritime employer violated safety statutes analogous to the Safety Appliances and Boiler Inspection Acts, 45 U.S.C. §§ 1-43, which clearly apply to § 53's proviso, *see Coray*, 335 U.S. at 524, then the seaman's negligence will not reduce the damage award. *Neal v. Saga Shipping Co., S.A.*, 407

F.2d. 481, 485-486 (5th Cir.), *cert. denied,* 395 U.S. 986 (1969). The court concluded, however, that the injured party was a longshoreman to whom the Jones Act did not apply. In another case the court reserved the question because it found no violation of a safety statute occurred.

B-R Dredging Co. v. Rodriguez, 564 S.W.2d 693, 695 (Tex. 1978). Finding the regulations proffered by Kopczynski to be inapplicable, we also reserve the the issue of how and when the violation of a safety statute or regulation might preclude consideration of an injured seaman's comparative negligence in a Jones Act cause.

Kopczynski argues that Seaward violated two sets of related regulations: the OSHA Shipyard Employment Regulations governing the use of gangways or ladders for access to a vessel, 29 C.F.R. § 1915.74; and the Defense Acquisition Regulations, 32 C.F.R. § 12-501, which provide that the OSHA Shipyard Regulations are applicable to defense contractors.

The district court correctly found these regulations do not govern the operation of The Jacqueline. The OSHA Shipyard Employment Regulations were promulgated under the authority of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, and the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

The Occupational Safety and Health Act provides that:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). The Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen. 14 U.S.C. § 2.

In turn, the LHWCA's scope is limited. It protects the rights of "employees" which are defined as a:

> longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of any crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

33 U.S.C. § 902(3).

The Shipyard Employment Regulations themselves recognize this limited scope:

> This part does not apply to matters under the control of the United States Coast Guard within the scope of Title 52 of the Revised Statutes and Acts supplementary or amendatory thereto ... including, but not restricted to, the master, ship's officer, crew members, design, construction and maintenance of the vessel, its gear and equipment....

29 C.F.R. § 1915.2(b).

Kopczynski is a crew member of The Jacqueline and brought this action based on his status as a seaman. The regulations governing the safety of habor workers and longshoremen do not apply. *See Donovan v. Texaco, Inc.* 720 F.2d 825, 826-829 (5th Cir. 1983); *Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980); *Clary v. Ocean Drilling & Exploration Co.*, 609 F.2d 1120, 1122 (5th Cir. 1980).

B. *Maintenance and Cure*

Kopczynski contends that as a matter of law the district court should have granted him attorney's fees in conjunction with his maintenance and cure award. We are not persuaded.

Maintenance and cure is the obligation of a ship-owner to care for a seaman injured during the course of maritime employment. *See Vaughan v. Atkinson*, 369 U.S. 527, 531-532 (1962); *Crooks v. United States*, 459 F.2d 631, 632-633 (9th Cir. 1972). In *Vaughan*, the Supreme Court held that attorney's fees incurred in order to secure a maintenance and cure award may be recovered in addition to the usual items such as medical care, food, and lodging. Here, the district court followed the approach of the circuit courts that have construed the scope of *Vaughan* and interpret it to allow attorney's fees only when the failure to provide maintenance and cure was arbitrary, recalcitrant or unreasonable. *Icandela v. American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981); *Gaspard v. Taylor Diving & Salving Co.*, 649 F.2d 372, 375 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *see Vaughan*, 369 U.S. at 530-531. We approve.

In an instruction and special interrogatory, the district court requested the jury to decide whether Seaward was "willful and arbitrary in failing to pay maintenance and cure," to which it responded in the answer to the interrogatory, "No." We see no reason to disturb that finding. Kopczynski originally received workman's compensation benefits as a longshoreman or harbor worker. Four months after Kopczynski filed this action as a seaman under the Jones Act, the benefits were terminated. The jury could have reasonably concluded that the failure to provide further maintenance and cure once the benefits were terminated was not unreasonable due to the uncertain nature of Kopczynski's status.

C. *Unseaworthiness*

In its answer to a special interrogatory, the jury found that The Jacqueline was not unseaworthy. Kopczynski contends that the district court should have directed a verdict in his favor on this issue; the jury instructions

regarding the law of unseaworthiness were inadequate; and the district court erroneously excluded evidence pertaining to this claim. We find these contentions to be without merit.

At the outset, we note that Kopyczynski is not entiled to independent recoveries for his negligence and unseaworthiness claims. 1B *Benedict on Admiralty*, § 21 at 3-3 (1983). Comparative negligence principles apply to each theory, *id.*, § 25 at 3-92, so his compensatory remedy would be the same under either claim. There may, however, be a distinction between the two theories in the area of punitive damages, as discussed in the next section. We therefore discuss Kopczynski's argument on this issue, even though his claim is under general principles moot because Seaward does not question the propriety of Kopczynski's compensatory damage award.

Kopczynski failed to move for judgment notwithstanding the verdict, so we will not pass on the question whether a directed verdict was mandated by the evidence. 5A *Moore's Federal Practice*, ¶ 50.12 at 50-108 (1984).

Kopczynski's attack on the jury instructions consists of the conclusory statement that they were "inadequate" for such a complex area of the law. First, Kopzynski did not object to the court's failure to give the instructions he proposed. He therefore lost his right to raise this issue on appeal. Fed. R. Civ. P. 51; *see Robert Waikiki U-Drive, Inc. v. Budget Rent-A-Car, Inc.*, 732 F.2d 1403, 1410 (9th Cir. 1984). Second, Kopczynski's conclusory contention of "inadequacy" does not provide us with a sufficient basis on which to review the instructions. Objections to jury instructions must be specific, *see* Fed. R. Civ. P. 51, and so should claims of error in that respect be on appeal.

Last, Kopczynski argues that the district court erroneously excluded evidence of the regulations discussed earlier. As stated, they are not applicable.

D. *Punitive Damages*

On cross-appeal, Seaward contends that as a matter of law the district court should not have awarded punitive damages. This presents a novel question in this circuit and we agree with Seaward that such damages are not recoverable in this case.

Initially, it must be emphasized that we are presented only with the question whether punitive damages are recoverable under the Jones Act. As just discussed, the jury did not find that The Jacqueline was unseaworthy under general maritime law and we see no reason to disturb that conclusion. Therefore, we offer no opinion on whether punitive damages may be recovered on an unseaworthiness claim. *See Dyer v. Merry Shipping Co.*, 650 F.2d 622 (5th Cir. 1981) (Fifth Circuit concluding that a finding of unseaworthiness may support a punitive damage award); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984) (willful failure to pay maintenance and cure can support punitive damage award); *cf.* Note, *Punitive Damages in Admiralty*, 18 Hastings L.J. 995, 1002 (1967) (punitive damages based on unseaworthiness claim not available).

We have discussed how the Jones Act incorporates by reference the standards of the FELA. Prior to enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions. *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 71-72 (1913); *Gulf, Colorado and Santa Fe Railway Co. v. McGinnis*, 228 U.S. 173, 175-176 (1913); *see Kozar v. Chesapeake and Ohio Railway Co.*, 449 F.2d 1238, 1240-1243 (6th Cir. 1971).

We find this limitation of recovery applicable to this case. In *Merry Shipping*, the Fifth Circuit recognized that punitive damages may not be available under the Jones

Act because under it recovery is limited to "pecuniary" losses, even though the court did hold that an unseaworthiness claim may support such an award. 650 F.2d at 626. This circuit also limits Jones Act damage awards to pecuniary losses. *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). Punitive damages are non-pecuniary. Under our precedent, therefore, they may not be awarded on a claim of negligence based on the Jones Act. Any argument that they should be available ought to be addressed to Congress. *See id.* (citing *DoCarmo v. F. V. Pilgrim I. Corp.*, 612 F.2d 11, 13 n.3 (1st Cir. 1979), *cert. denied*, 446 U.S. 956 (1980)). In reaching this result, we find support in a persuasive article discussing the legislative history and case law of the Jones Act. Dahlquist, *Punitive Damages Under the Jones Act*, 6 Maritime Lawyer 1-36 (1981).

III.

CONCLUSION

We affirm the judgment in all respect except the punitive damage award, which we reverse.

AFFIRMED IN PART; REVERSED
and REMANDED IN PART.

APPENDIX B

ORDER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY ALAN KOPCZYNSKI,
Plaintiff-Appellant/Cross-Appellant,

vs.

THE JACQUELINE, Documentation Number 519060,
Her Engine, Tackle, Appurtenances, etc.,
In REM, SEAWARD MARINE SERVICES, INC.,
a California Corporation,
SEAWARD MARINE SERVICES, INC.,
a Virginia Corporation,
ABC DOE CORPORATION, WENDY WEBBER,
JIM WALKER and TIM ORSAC,
individually, In Personam,
Defendants-Appellants/Cross-Appellees.

FILED JANUARY 10, 1985
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals
Nos. 83-6108, 83-6152
D.C. No. CV 82-0123-S(I)

Before: ANDERSON, TANG, and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The motion of Barbara Munden to file an amicus curiae is DENIED.

The motion to stay issuance of the mandate is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 727, 728 — August Term 1983
(Argued: Februray 9, 1984 Decided: July 10, 1984)
Docket Nos. 83-4158, 4168

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Petitioner/Cross-Respondent,

VS.

RED STAR MARINE SERVICES, INC.,
Respondent/Cross-Petitioner.

Before:
VAN GRAAFEILAND and TIMBERS, *Circuit Judges,*
and RE, *Chief Judge**.

Cross-petitions by the Secretary of Labor and Red Star Marine Services, Inc., from a final order of the Occupational Safety and Health Review Commission, in an action by the Secretary against Red Star for violation of 29 C.F.R. § 1910.95. The Commission held that, although the Occupational Safety and Health Administration had obtained valid *ex parte* warrants to inspect the tugboat STAMFORD, it did not have jurisdiction over the working conditions of "seamen," aboard uninspected vessels.

Affirmed in part, Reversed in part, and Remanded.

JAMES E. CULP, Attorney, United States Department of Labor (Francis X. Lilly, Deputy Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; Dennis K. Kade, Counsel for Appellate Litigation; Shelley D. Hayes, Attorney, Washington, DC, of counsel), *for Petitioner/Cross-Respondent.*

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*The Hon. Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

JAMES M. KENNY, New York, New York (McHugh, Leonard & O'Conor, New York, New York, of counsel), *for Respondent/Cross-Petitioner.*

RE, *Chief Judge:*

By cross-petitions, both parties appeal from a final order of the Occupational Safety and Health Review Commission (Commission) which held that, although the Occupational Safety and Health Administration (OSHA obtained a valid *ex parte* warrant, it did not have jurisdiction over the working conditions of "seamen" aboard an "uninspected vessel." In general terms, this case presents a jurisdictional conflict between two federal agencies, OSHA and the Coast Guard.

The two questions presented are: (1) whether OSHA has jurisdiction over the "working conditions" of employees aboard uninspected vessels[1] operating on navigable waters, or whether the Coast Guard, a sister federal agency, had "actually exercised" its authority over the working conditions of employees aboard uninspected vessels operating on navigable waters; and (2) whether the *ex parte* warrants obtained by OSHA in this case were valid.

Since we hold that OSHA has jurisdiction over the working conditions of employees aboard uninspected vessels, and that the *ex parte* warrants were valid, we remand the case for further proceedings consistent with this opinion.

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[1]Chapter 1 of 46 Code of Federal Regulations and the recent amendments to Title 46, United States Code, enacted by Pub. L. 98-89, 97 Stat. 500 (1983), classify vessels according to factors such as weight, purpose, and method of propulsion. One type of vessel classified pursuant to Title 46 is an "uninspected vessel," which is a term used to denote that it is not subject to the Coast Guard's inspection and Certification authority. 46 U.S.C. § 2101(43).

The Facts

Red Star Marine Services, Inc. (Red Star) operates a tugboat and marine towing service along the eastern seaboard of the United States. Its fleet includes the tugboat "STAMFORI," which was inspected by an OSHA Compliance Officer on the 27th and 29th of May, 1980. The inspection, prompted by an employee complaint, was conducted pursuant to an *ex parte* warrant issued by a United States Magistrate after Red Star had refused the Compliance Officer's request to inspect the tugboat for safety and health violations. As a result of that inspection, the Secretary of Labor, the statutory head of OSHA, cited Red Star with violations of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 651, *et. seq.,* (1982) (OSH Act). In particular, the Secretary alleged violation of 29 C.F.R. § 1910.95, in that, Red Star had failed to provide protection against excessive noise levels, and had failed to administer a continuing hearing conservation program.

The Administrative Proceedings

Red Star contested the Secretary's allegations and pursued the available administrative remedies. Subsequent to the first hearing, in a decision dated July 13, 1982, the OSHA Administrative Law Judge (ALJ) upheld the Secretary's actions, and rejected Red Star's contentions that OSHA lacked jurisdiction, and that the warrants were invalid. Red Star petitioned the Commission for discretionary review. On review, the Commission upheld the validity of the warrants, and remanded, for reconsideration by the ALJ, the question of jurisdiction in light of *Dillingham Tug & Barge Corp.,* _____ OSAHRC _____, 10 O.S.H. Cas. (BNA) 1859, 1982 O.S.H. Dec. (CCH) ¶ 26,166 (1982). In *Dillingham,* the Commission found that "the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating

on navigable waters." *Id.* at ____, 10 O.S.H. Cas. (BNA) at 1861, 1982 O.S.H. Dec. (CCH) at 32,996. Hence, since "section 4(b)(1) precludes the Secretary from enforcing the OSH Act with respect to [the] working conditions" of "seamen" aboard vessels operating on the navigable waters, the Commission held that the Coast Guard had exclusive jurisdiction. *Id.* at _____, 10 O.S.H. Cas. (BNA) at 1860, 1982 O.S.H. Dec. (CCH) at 32,995.

Pursuant to the remand order, a second hearing, which consisted largely of the testimony of a Coast Guard officer, was held on February 9, 1983. Based upon that testimony, the regulations found in 46 C.F.R., Chapter I, and the Commission's decision in *Dillingham,* the ALJ reversed his prior decision, and held that since the Coast Guard had jurisdiction, OSHA could not enforce its regulations in this case. Since the Commission did not act upon the Secretary's petition for discretionary review of the decision on remand, on June 23, 1983, by operation of section 12(j) of the OSH Act, 29 U.S.C. § 661(i), the ALJ's decision became a final order of the Commission.

Pursuant to sections 11(a) & (b) of the OSH Act, 29 U.S.C. §§ 660 (a) (b) (1982), the Secretary seeks judicial review of the determination that OSHA does not have jurisdiction over the working conditions of "seamen" aboard uninspected vessels. Red Star, by cross-petition, seeks review of that part of the Commission decision which upheld the validity of the *ex parte* warrant.

Standard of Review

The OSH Act applies to all employment performed in workplaces located within the several states; the District of Columbia; Puerto Rico; the Virgin Islands; Samoa, Guam, Wake and Johnston Islands; the Trust Territory of the Pacific Islands; and on the Outer Continental Shelf lands. Section 4(a), 29 U.S.C. § 653(a). Unless engaged in

the field of nuclear or atomic energy, a private employer is not exempt from the OSH Act. The only exception is when a sister federal agency is vested with the statutory authority to prescribe or regulate occupational safety or health matters within its purview. Section 4(b)(1), 29 U.S.C. § 653(b)(1).

In this case, the Commission vacated OSHA's citation of the STAMFORD for noncompliance with its occupational noise regulation, on the ground that the Coast Guard comprehensively regulates the working conditions of employees aboard uninspected vessels on navigable waters. In *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119 (2d Cir. 1978), this Court considered the question of the exemption pursuant to section 4(b)(1), and held that it is a mixed question of "law and fact." *Id.* at 122.

The applicable standard of review for questions of fact is specified in section 11(a) of the OSH Act, 29 U.S.C. § 660(a), which provides that the findings of the Commission "if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* As to questions of law, however, the court is free to determine whether the Commission's legal conclusion is "in accordance with law." 5 U.S.C. § 706(2)(a). It is, of course, the function of the court to ascertain the meaning of the pertinent legislation, and to give effect to the legislative purpose. Nevertheless, judicial authority teaches that, even in cases of statutory interpretation and application, appropriate weight must be given to the interpretation of a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). *Accord Tyson v. Maher*, 523 F.2d 972, 974 (2d Cir. 1975). This standard has been followed by other circuits in an occupational health and safety context. *See Dunlop v. Rockwell International*, 540 F.2d 1283, 1289-90 (6th Cir. 1976) (deferring to the Commission's construction of the Act despite the

Secretary's contrary view). *Accord GAF Corp. v. OSHRC*, 561 F.2d 913, 915 (D.C. Cir. 1977) (deferring to administrative interpretation of OSHA regulations when the Secretary and the Commission agreed).

Jurisdiction

The first question presented requires the interpretation of section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1) (1982). This section provides that:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Id.

The Commission agrees that a correct interpretation of section 4(b)(1) requires an actual exercise of delegated statutory authority. We differ with the Commission, however, on the issue of whether the Coast Guard has actually exercised the authority conferred. Thus, the question presented does not involve an ordinary question of fact, but rather, the interpretation and application of the statutes and regulations applicable to the authority and responsibilities of the Coast Guard.

It is undisputed by the parties that the Coast Guard possesses extensive statutory authority, and is the agency primarily responsible for maritime safety. Section 2 of Title 14 provides that the Coast Guard "shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . ."

Id. Numerous sections of Title 46 of the United States Code also grant specific authority to the Coast Guard. *See, e.g.*, 46 U.S.C. §§ 3301-18 (governing inspection of vessels). The proposition that Congress intended the Coast Guard to be primarily responsible in the area of maritime safety is suported by the legislative history of the recent amendments to Title 46, H.R. Rep. No. 338, 98th Cong., 1st Sess., *reprinted in* 1983 U.S. Code Cong. & Ad. News 924.

It is equally clear, however, and also undisputed by the parties, that the Coast Guard does not exercise and has not exercised any statutory authority to regulate noise hazards aboard uninspected vessels such as the STAMFORD. In fact, the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators. In the past, the Coast Guard had made several attempts to obtain additional grants of authority from Congress in order to regulate more comprehensive the uninspected fleet. *See, e.g.*, Marine Safety Program: Hearings on H.R. 3486 before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 466-68 (1983) (statement of Admiral James C. Gracey, Commander, U.S. Coast Guard). Indeed, in his testimony before the House Subcommittee on Coast Guard and Navigation, Admiral Gracey, Commandant of the Coast Guard, specifically requested additional authorities over uninspected vessels: "We . . . need some statutory authority [to regulate uninspected vessels]. We don't have that now." *Id.* at 467. Congressional inaction on this suggestion, most notably the failure to provide additional authority to regulate towing vessels, clearly evidences an unwillingness to expand the Coast

Guard's authority over the uninspected fleet. Hence, it cannot be questioned that there is a significant distinction between "uninspected" vessels and "inspected and certificated" vessels, in that the regulations affecting "inspected and certificated" vessels are more numerous, extensive, and pervasive than those affecting "uninspected" vessels.

Notwithstanding an exhaustive search, we have been unable to discover any provision in the United States Code, or the Code of Federal Regulations, which addresses the Coast Guard's authority to regulate noise hazards above uninspected vessels. We do, however, take judicial notice of the fact that the Coast Guard has issued *recommendations* on the control of excessive noise in *Navigation and Vessel Inspection Circular 12-82, dated* June 2, 1982. It is important to note that this circular was promulgated after the events which led to this litigation, and, by its terms, was directed toward inspected and not uninspected vessels.

Thus, we are faced with the question whether, under section 4(b) of the OSH Act, the regulatory authority of the Coast Guard in maritime matters preempts OSHA's statutory authority to regulate a hazard aboard a vessel not addressed by the Coast Guard.

Although not in issue, the Secretary concedes that the pervasive regulations by the Coast Guard of safety and health matters aboard *inspected* vessels eliminates or excludes OSHA's jurisdiction over those vessels.[2] The

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[2]In accordance with a "Memorandum of Understanding" signed by the Commandant of the Coast Guard and the Assistant Secretary for Occupational Safety and Health, Department of Labor, the Secretary has taken the position, that "the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard *inspected vessels*," and that OSHA may not enforce its regulations with respect to "seamen" aboard *inspected* vessels.

Secretary, however, maintains that the Coast Guard has not "comprehensively exercised," within the meaning of section 4(b), statutory authority as to the working conditions, particularly noise hazards, of "seamen" aboard uninspected vessels. The Secretary contends that comprehensive regulation is required to justify an industry-wide exemption from OSHA regulation. On the other hand, Red Star contendes that the Coast Guard has exercised jurisdiction over some matters affecting the health and safety of its "seamen" aboard the STAMFORD, an uninspected vessel, and that preemption may occur even though the Coast Guard has chosen to regulate less stringently than OSHA.

Were this to be a case of first impression, it would seem clear that noise is a "working condition" within the plain meaning of section 4(b)(1), and that the Coast Guard has not "exercised" statutory authority over noise aboard uninspected vessels. It would follow, therefore, that the OSHA regulations would apply. Similar issues, however, have been presented to a number of circuit and district courts which have not interpreted section 4(b)(1) consistently.

In *Marshall v. Northwest Orient Airlines, Inc., supra,* this Court held that section 4(b)(1) was not intended "to eliminate OSHA's jurisdiction merely on the basis of hypothetical conflicts," nor "designed to provide wholesale exceptions for entire industries." *Id.* at 122. Accordingly, this Court held that "a sister agency must actually be *exercising* a power to regulate safety conditions in order to preempt OSHA." *Id.* (emphasis in original).

Other circuits have agreed with the interpretation that the term "exercise," as used in section 4(b)(1) of the Act, requires an actual, concrete assertion of regulatory authority as opposed to a mere possession of authority.

Furthermore, the decisions teach that section 4(b)(1) was not intended to create industry-wide exemptions based on isolated or narrow exercises of statutory authority. In *Southern Ry. Co. v. OSHRC,* 539 F.2d 335 (4th Cir.), *cert. denied,* 429 U.S. 999 (1976), the Fourth Circuit demonstrated that this view of section 4(b)(1) was indeed the intent of Congress. *Id.* at 336-37. *See also Southern Pacific Transp. Co. v. Usery,* 539 F.2d 386, 390 (5th Cir. 1976), *cert. denied,* 434 U.S. 874 (1977); *Baltimore & Ohio R.R. Co. v. OSHRC,* 548 F.2d 1052, 1054 (D.C. Cir. 1976). We agree that the term "exercise," as used in section 4(b)(1) of the Act, requires more than isolated regulations peripherally affecting the working condition of employees.

Red Star cites authority for the proposition that, because of pervasive regulation by the Coast Guard of working conditions on board vessels in navigation, there is, for "seamen," an industry-wide exemption from OSHA regulation. We reject this contention. First, the authorities relied upon are distinguishable, and, furthermore, most of the opinions cited did not address the considerable variation in the pervasiveness of Coast Guard regulation between inspected and uninspected vessels.

In *Donovan v. Texaco, Inc.,* 720 F.2d 825 (5th Cir. 1983), the question was whether section 11(c) of the OSH Act could be enforced as to "seamen." Although the Fifth Circuit deferred to the Commission's opinion in *Dillingham,* which held that OSHA lacked jurisdiction over the working conditions of "seamen" aboard uninspected vessels, it also found an actual conflict with the Coast Guard's scheme of regulation. The court held that "the parallel but divergent protective plan of 11(c) would be precisely the sort of duplication [by sister federal agencies] that the Congress meant to forbid by enacting Section 4(b)(1) of OSHA." *Id.* at 829.

The *Texaco* opinion was based in part on an earlier Fifth Circuit opinion, *Clary v. Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980), which not only deferred to Commission precedent, but also based its decision on a ground independent of section 4(b)(1), *Clary* involved a Jones Act suit in which the plaintiff alleged he was injured as a result of several violations of OSHA regulations. These violations, he argued, constituted negligence *per se*. The court examined those regulations and concluded that they were intended to cover only certain specific situations, and did not apply to the situation which occasioned the plaintiff's injury. *Id.* at 1122.

In support of its position, Red Star also refers to the following language quoted from *Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980):

> The Coast Guard has responsibility for the safety of "seamen" under the regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. This exclusivity is expressly declared in connection with longshoring; it is implicit so far as seamen are concerned.

Id. at 93. In *Taylor*, the question was whether certain Coast Guard regulations applied to "longshoremen," not whether OSHA regulations applied to "seamen" aboard uninspected vessels. Again, the court did not consider the void or *lacunae* which existed by virtue of the lack of pervasive Coast Guard regulation of working conditions of employees aboard uninspected vessels. Hence, *Taylor* cannot be said to have precedential authority.

Finally, Red Star relies on the following quotation from *Barger v. Mayor & City Council of Baltimore*, 616 F.2d

730 (4th Cir.), *cert. denied,* 449 U.S. 834 (1980): "In 29 C.F.R. § 1910.5(b), the Labor Department placed outside the reach of the regulations employees whose occupational safety and health are within the statutory jurisdiction of other federal agencies. The Coast Guard is empowered to lay down health and safety rules for Jones Act seamen . . . ." *Id.* at 732. It is clear that 29 C.F.R. § 1910.5(b) is simply a restatement of section 4(b)(1) of the OSH Act. It does not in any way alter our view that mere possession of statutory authority is insufficient to preempt OSHA, and that section 4(b)(1) requires an actual, concrete exercise of that authority. We, therefore, hold that noise aboard an uninspected vessel is a working condition which is not regulated by the Coast Guard.

We realize that our holding is contrary to the opinion expressed by the Commission in *Dillingham.* In precluding OSHA jurisdiction in *Dillingham,* the Commission rejected the distinction between inspected and uninspected vessels, and justified its view on the basis of the few Coast Guard regulations that applied to uninspected vessels.

In our view, isolated Coast Guard regulations, such as the load line statute, 46 U.S.C. § 88, do not constitute an *exercise* of statutory authority by the Coast Guard, within the meaning of section 4(b)(1), sufficient to oust OSHA of jurisdiction to regulate working conditions for employees aboard uninspected vessels.

While the regulations cited by the Commission in *Dillingham* are safety regulations which pertain to the "seaworthiness" of vessels and the safety of those aboard, they only incidentally regulate the working conditions of employees. Examples of safety regulations only incidental to the regulation of working conditions are: regulations on the use of petroleum gas, 46 C.F.R. § 25.45-1; ven-

tilation requirements, 46 C.F.R. § 25.40-1; backfire flame control, 46 C.F.R. § 25.35-1; and fire extinguishers, 46 C.F.R. § 25.30. Other regulations merely govern qualifications for a particular employment, for example, the manning requirements found in 46 C.F.R. § 157, and not the working conditions of that employment.

It would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulation of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act. There can be no doubt that it was the intent of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). *Accord Marshall v. Western Electric, Inc.*, 565 F.2d 240, 245 (2d Cir. 1977). It is also beyond question that section 4(b)(1) of the OSH Act should be interpreted and applied "to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry. Co.*, 539 F.2d at 338. As recognized by the Supreme Court of the United States, Congress has historically been especially protective of "seamen":

> [W]orkers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages and return transportation to this country if destitute abroad.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 39 (1942) (citation omitted). That this solicitude is longstanding may be noted from many of the provisions of Title 46, Subtitle II, Part G, 46 U.S.C. §§ 10101-11507 (Supp. 1983),

entitled "Merchant Seamen Protection and Relief," which date back well over a century.

To agree with the views expressed by Red Star would result in this Court mandating the *status quo*. As a practical matter, this would mean that neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees exposed to the hazard of excessive noise.

In light of the extensive tradition of congressional concern for mariners, Congress could not have intended that employees aboard uninspected vessels be deprived of the protections accorded the vast majority of American workers by the OSH Act, and those protections offered employees aboard inspected and certificated vessels. It is clear that the Coast Guard's regulation of uninspected vessels is limited to only a few areas. Consequently, it cannot be said that it is exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels.

Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act, we hold that OSHA possesses statutory authority to regulate the working conditions of employees aboard uninspected vessels. Hence, OSHA may regulate noise hazards aboard uninspected vessels.

Ex Parte Warrant

The second question presented requires that we determine whether the Secretary was empowered to obtain the *ex parte* warrant which authorized the OSHA Compliance Officer to inspect the STAMFORD. The Secretary contends that the version of regulation 1903.4, which was in effect at the time the STAMFORD was inspected, authorized OSHA to obtain *ex parte* warrants. Red Star's assertion

that the Secretary was not authorized necessitates an examination of the history of this regulation.

To effectuate the strong congressional policy that every person employed in the United States be afforded a safe working environment, the Secretary of Labor, as statutory head of OSHA, was expressly granted the authority to enter and inspect workplaces for occupational hazards "during regular working hours and at other reasonable times. . . ." Section 8(a), 29 U.S.C. § 657(a)). Section 8(g)(2), 29 U.S.C. § 657(g)(2), of the OSH Act also authorizes the Secretary to promulgate rules and regulations necessary to implement this statutory authority.

In 1971, proposed regulation 1903.11, predecessor of regulation 1903.4, was promulgated pursuant to section 8(g). Pursuant to the regulation, a compliance officer was to report the employer's denial of voluntary access to the Area Director, who was to consult with both the Regional Administrator and the Regional Solicitor for the purpose of "promptly seek[ing] appropriate compulsory process." 36 Fed. Reg. 8,376, 8,378 (May 5, 1971). The proposed regulation was subsequently renumbered and adopted, containing a minor alteration which directed the compliance officer to "take appropriate action, including compulsory process, if necessary." *Id.* at 17,851 (Sept. 4, 1971) (current version at 29 C.F.R. § 1903.4 (1983)).

Subsequent to the adoption of regulation 1903.4, OSHA issued a series of Compliance and Field Operations Manuals. These manuals, which provide guidance to OSHA compliance officers in enforcing the OSH Act, contained explicit provisions to the effect that inspection warrants would be obtained in appropriate circumstances without advance warning to the affected employer. For example, 2(i) of the original 1972 version of the manual stated that: "[e]xcept in unusual circumstances . . ., there shall be no

advance warning to the employer of the fact either that a warrant has been secured or that inspection will take place pursuant to the warrant." In 1976, the manual was amended and excluded 2(f), which dealt with situations where a compliance officer did not have to obtain permission to inspect, but, retained 2(i) with one modification, the term "compulsory process" was substituted for that of "warrant."

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the issue before the Supreme Court was the constitutionality of OSHA's practice of nonconsensual warrantless inspections made pursuant to regulation 1903.4. The Court held that, although no serach warrant or other process is expressly required by the OSH Act, OSHA's practice of compelling compliance by nonconsensual warrantless inspections violated the Fourth Amendment. *Id.* at 324.

Since the present case deals with an inspection pursuant to an *ex parte* warrant issued by a United States magistrate, and not a nonconsensual warrantless inspection held unconstitutional in *Barlow's,* an extended discussion of the validity of warrantless inspections is not required. *See Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. Seattle,* 387 U.S. 541 (1967).

However, in *Barlow's* the Supreme Court, in commenting on the alternatives to nonconsensual warrantless inspections, appeared to interpret the words "compulsory process," as contained in 29 C.F.R. § 1903.4 (1977), as not including *ex parte* warrants. *See* 436 U.S. at 318. These comments by the Supreme Court, pertaining to whether compulsory process includes *ex parte* warrants, are generally conceded by federal courts to be *dicta.* Nevertheless, in *Cerro Metal Products v. Marshall,* 467 F.Supp. 869 (E.D. Pa. 1979), *aff'd,* 620 F.2d 964 (3d Cir. 1980), the district court found that the Supreme Court's comments in *Bar-*

low's properly interpreted regulation 1903.4, and held that the Secretary was not empowered to seek *ex parte* warrants. *Id.* at 872. On December 22, 1978, in response to a preliminary injunction issued in the *Cerro Metal* case, and while the *Cerro Metal* proceedings were still pending, the Secretary published a regulation which amended 29 C.F.R. § 1903.4. *See* 43 Fed. Reg. 59,838 (Dec. 22, 1978). The regulation which amended 29 C.F.R. § 1903.4 expressly provided that "compulsory process" included the seeking of *ex parte* warrants, 29 C.F.R. § 1903.4(d). The Secretary published this regulation without meeting the notice and comment provisions of the Federal Administrative Procedure Act 5 U.S.C. § 553, pursuant to the exemption for "interpretative rules and statements of policy." *Id.* (d)(2).

In *Cerro Metal,* however, District Judge Pollak ruled that since the amendment of December 22, 1978 would "substantially affect[ ] the rights of those over whom the agency exercises authority," it was actually a substantive regulation, and, therefore, was invalidly promulgated. *Id.* at 879-80 (quoting *Pickus v. United States Board of Parole,* 507 F.2d 1107, 1114 (D.C. Cir. 1974)). A panel of the Court of Appeals for the Third Circuit, with Chief Judge Seitz dissenting, affirmed. The majority opinion stated that the district court correctly distinguished between interpretative and legislative rules, and found that the regulation in question was a legislative rule "masquerading" as an interpretative rule. 620 F.2d at 981. This view was followed by the Fifth Circuit in *Donovan v. Huffines Steel Co.,* 645 F.2d 288, 289 (5th Cir. 1981), *aff'g mem. Marshall v. Huffines Steel Co.,* 438 F.Supp. 995 (N.D. Tex. 1979), and *Smith Steel Casting Co. v. Donovan,* 725 F.2d 1032, 1034 (4th Cir. 1984). Red Star cites these cases and contends that they express the correct view.

The Secretary, on the other hand, contends that regulation 1903.4 was always intended to include authority to seek

ex parte warrants; that the Supreme Court's comments in *Barlow's* were non-binding *dicta*; and that, in the alternative, the December 22, 1978 regulation effectively clarified the confusion caused by the Supreme Court's *dicta* in *Barlow's.*

Upon careful review of this important question, we are persuaded by the contentions of OSHA, and disagree with Red Star on several grounds. Furthermore, we feel that both the majority opinion of the Court of Appeals and the District Court in *Cerro Metal* misinterpreted the Supreme Court's discussion of regulation 1903.4 in *Barlow's.* In *Barlow's,* the Supreme Court only held that OSHA's practice of nonconsensual warrantless inspections violated the Fourth Amendment. It did not hold that OSHA did not have the statutory authority to seek *ex parte* warrants. Indeed, in footnote 15 of the *Barlow's* opinion, the Court stated: "Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for 'compulsory process.'" *Id.* at 320 n.15. Furthermore, in discussing the alleged threat that obtaining warrants would pose upon the efficient administration of OSHA, the Supreme Court stated that "the Secretary should never have adopted [regulation 1903.4], particularly when the Act does not require it." *Id.* at 319. The confusion stems from the Court's interpretation of the words "compulsory process" as not including *ex parte* warrants. Clearly, these comments were non-binding *dicta,* and we disagree with the view that it was integral to the Supreme Court's holding. *See Cerro Metal,* 467 F.Supp. at 876. While we, of course, agree that the *dicta* of the nation's highest Court merits the greatest deference, we also heed the admonition of Chief Justice Marshall that:

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. . . .

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821), *quoted in,* Re, *Stare Decisis,* 79 F.R.D. 509, 512 (1978). Accordingly, we respectfully decline to follow the Supreme Court *dicta* since upon plenary consideration, a different result is warranted.

We agree with the view expressed by Chief Judge Seitz in his dissent in *Cerro Metal* that "the phrase 'compulsory process' in § 1903.4 is certainly broad enough to encompass ex parte warrants [and that,] the ordinary meaning of that phrase includes ex parte warrants." 620 F.2d at 983 (Seitz, C.J., dissenting). We also agree that dropping 2(f) from the 1976 manual only meant that a compliance officer must first seek the owner's permission before inspecting the premises. It did not mean that the use of *ex parte* warrants was not contemplated by the 1976 manual. This is supported by the retention of 2(i) in subparagraph (8), pertaining to the element of surprise, which represented a fall-back position in case warrants were required. Indeed, as stated by Chief Judge Seitz, the Supreme Court's *dicta* in *Barlow's* when "[v]iewed in light of [OSHA's] litigation strategy . . . makes sense." *Id.* at 1984.

Other circuits which have faced this problem have held that OSHA had the authority to seek *ex parte* warrants, but indicate that the 1978 amendment was necessary for the Secretary to continue to seek them. For example, in *Rockford Drop Forge Co. v. Donovan,* 672 F.2d 626 (7th Cir. 1982), Rockford challenged OSHA's *ex parte* inspec-

tion of its premises, claiming that it had no power to obtain an *ex parte* warrant since the 1978 amendment was invalid due to noncompliance with section 4(b) of the Administrative Procedure Act. In holding both the warrant and the amendment valid, the court stated that the Secretary "took advantage of the Supreme Court's suggestion" when it promulgated the 1978 amendment, and that the 1978 amendment was "approved in advance" by the Supreme Court. *Id.* at 630. Similarly, the Tenth Circuit in *Marshall v. W & W Steel, Inc.*, 604 F.2d 1322 (10th Cir. 1979), held that since the 1978 amendment was an interpretative rule, OSHA had the authority to obtain an *ex parte* warrant in that case. *Id.* at 1325-26.

Although we are of the opinion that it was not necessary for the Secretary to amend regulation 1903.4 in order to seek *ex parte* warrants, we do believe that the Secretary's 1978 action is indicative of the position that he has taken consistently and merits discussion. While it is unfortunate that Congress has provided little guidance in distinguishing interpretative from substantive rules, the case law in this circuit looks to whether a rule "changed existing rights and obligations." *Lewis-Mota v. Secretary of Labor,* 469 F.2d 478, 482 (2d Cir. 1972); *Noel v. Chapman,* 508 F.2d 1023, 1030 (2d Cir.) *cert. denied,* 423 U.S. 824 (1975); *Viacom Int'l Inc. v. FCC,* 672 F.2d 1034, 1042 (2d Cir. 1982). Only rules that do not change "existing rights and obligations" are considered interpretative.

In our view, at the time the 1978 amendment was published, the Secretary was authorized by statute and regulation to seek the *ex parte* warrants, and the sole effect of the 1978 amendment was to dispel the uncertainty caused by the *dicta* in *Barlow's*. The 1978 amendment was therefore nothing more than what it purported to be, an

interpretative rule and statement of policy which had no substantive effect on the Secretary's administrative authority and responsibility under the statute. Nor did it alter the rights and duties of any person affected by the OSH Act. This view was expressed by the Ninth Circuit in *Stoddard Lumber Co., Inc. v. Marshall,* 627 F.2d 984, 990 (9th Cir. 1980), and by the Western District of Virginia, which held that the Secretary had always maintained the position that "compulsory process" included *ex parte* warrants. *Matter of Establishment Inspection of Seaward Int'l. Inc.,* 510 F.Supp. 314, 317 (W.D. Va. 1980), *aff'd mem. sub nom Marshall v. Seaward Int'l Inc.,* 644 F.2d 880 (4th Cir. 1981).

It is manifest that the Secretary, despite the perhaps infelicitous rewording of the manuals, had no intention to relinquish or renounce the authority to seek *ex parte* warrants. These changes were made simply to accommodate the procedure of compelling nonconsensual warrantless inspections, found unconstitutional in *Barlow's,* by replacing "warrant" with the broader and more inclusive words, "compulsory process." Thus, we find that, "compulsory process," as used by the Secretary in the regulation and in subsequent revisions of the manual, was always intended to encompass both the seeking of *ex parte* warrants, and actions to compel compliance with the nonconsensual warrantless inspections declared unconstitutional in *Barlow's.*

Hence, we hold that pursuant to its statutory authority and regulations, OSHA was authorized to seek *ex parte* inspection warrants at the time the STAMFORD was inspected, and that the *ex parte* inspection warrants obtained by OSHA in this case were valid.

Conclusion

In view of the foregoing, it is the holding of the court that noise is a "working condition," and, since the Coast Guard is not exercising jurisdiction over the working conditions of employees aboard uninspected vessels operating on navigable waters, OSHA may exercise its jurisdiction. Therefore, that part of the order on appeal which states that OSHA does not have jurisdiction, is REVERSED.

Since we also hold that the *ex parte* warrants obtained by OSHA in this case were valid, that part of the order on appeal which states warranties were valid, is AFFIRMED.

The case is REMANDED for further proceedings consistent with this opinion.

§ 1915.74

use of such guards is made impracticable by the work actually in progress.

(c) When employees are working around open hatches not protected by coamings to a height of 24 inches or around other large openings, the edge of the opening shall be guarded in the working area to height of 36 to 42 inches, except where the use of such guards is made impracticable by the work actually in progress.

(d) When employees are exposed to unguarded edges of decks, platforms, flats, and similar flat surfaces, more than 5 feet above a solid surface, the edges shall be guarded by adequate guardrails meeting the requirements of § 1915.71 (j) (1) and (2), unless the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails.

(e) When employees are working near the unguarded edges of decks of vessels afloat, they shall be protected by personal flotation devices, meeting the requirements of § 1915.154(a).

(f) Sections of bilges from which floor plates or gratings have been removed shall be guarded by guardrails except where they would interfere with work in progress. If these open sections are in a walkway at least two 10-inch planks placed side by side, or equivalent, shall be laid across the opening to provide a safe walking surface.

(g) Gratings, walkways, and catwalks, from which sections or ladders have been removed, shall be barricaded with adequate guardrails.

§ 1915.74 Access to vessels.

(a) *Access to vessels afloat.* The employer shall not permit employees to board or leave any vessel, except a

barge or river towboat, until the following requirements have been met:

(1) Whenever practicable, a gangway of not less than 20 inches walking surface of adequate strength, maintained in safe repair and safely secured shall be used. If a gangway is not practicable, a substantial straight ladder, extending at least 36 inches above the upper landing surface and adequately secured against shifting or slipping shall be provided. When conditions are such that neither a gangway nor a straight ladder can be used, a Jacob's ladder meeting the requirements of paragraphs (d)(1) and (2) of this section may be used.

(2) Each side of such gangway, and the turn table if used, shall have a railing with a minimum height of approximately 33 inches measured perpendicularly from rail to walking surface at the stanchion, with a mild rail. Rails shall be of wood, pipe, chain, wire or rope and shall be kept taut at all times.

(3) Gangways on vessels inspected and certificated by the U.S. Coast Guard are deemed to meet the foregoing requirements, except in cases where the vessel's regular gangway is not being used.

(4) The gangway shall be kept properly trimmed at all times.

(5) When a fixed tread accommodations ladder is used, and the angle is low enough to require employees to walk on the edge of the treads, cleated duckboards shall be laid over and secured to the ladder.

(6) When the lower end of a gangway overhangs the water between the ship and the dock in such a manner that there is a danger of employees falling between the ship and the dock, a net or other suitable protection shall be rigged at the foot of the gangway in such a manner as to prevent employees from falling from the end of the gangway.

(7) If the foot of the gangway is more than one foot away from the edge of the apron, the space between them shall be bridged by a firm walkway equipped with railings, with a minimum height of approximately 33 inches with midrails on both sides.

(8) Supporting bridles shall be kept clear so as to permit unobstructed passage for employees using the gangway.

(9) When the upper end of the means of access rests on or flush with the top of the bulwark, substantial steps properly secured and equipped with at least one substantial handrail approximately 33 inches in height shall be provided between the top of the bulwark and the deck.

(10) Obstructions shall not be laid on or across the gangway.

(11) The means of access shall be adequately illuminated for its full length.

(12) Unless the construction of the vessel makes it impossible, the means of access shall be so located that drafts of cargo do not pass over it. In any event, loads shall not be passed over the means of access while employees are on it.

(b) *Access to vessels in drydock or between vessels.* Gangways meeting the requirements of paragraphs (a) (1), (2), (9), (10), (11) of this section shall be provided for access from wingwall to vessel or, when two or more vessels, other than barges or river towboats, are lying abreast, from one vessel to another.

(c) *Access to barges and river towboats.* (1) Ramps for access of vehicles to or between barges shall be of adequate strength, provided with side boards, well maintained and properly secured.

(2) Unless employees can step safely to or from the wharf, float, barge, or river towboat, either a ramp in accordance with the requirements of paragraph (a)(7) of this section shall be provided. When a walkway is impracticable, a substantial straight ladder, extending at least 36 inches above the upper landing surface and adequately secured against shifting or slipping, shall be provided. When conditions are such that neither a walkway nor a straight ladder can be used, a Jacob's ladder in accordance with the requirements of paragraph (d) of this section may be used.

(3) The means of access shall be in accordance with the requirements of paragraphs (a) (9), (10), and (11) of this section.

(d) *Jacob's ladders.* (1) Jacob's ladders shall be of the double rung or flat tread type. They shall be well maintained and properly secured.

(2) A Jacob's ladder shall either hang without slack from its lashings or be pulled up entirely.

§ 1915.75 Access to and guarding of dry docks and marine railways.

The provisions of this section shall apply to ship repairing, shipbuilding and shipbreaking.

(a) A gangway, ramp or permanent stairway of not less than 20 inches walking surface, of adequate strength, maintained in safe repair and securely fastened, shall be provided between a floating dry dock and the pier or bulkhead.

(b) Each side of such gangway, ramp or permanent stairway, including those which are used for access to wing walls from dry dock floors, shall have a railing with a mid rail. Such railings on gangways or ramps shall be approximately 42 inches in height; and railings on permanent stairways shall be not less than approximately 30 or more

than approximately 34 inches in height. Rails shall be of wood, pipe, chain, wire, or rope, and shall be kept taut at all times.

(c) Railings meeting the requirements of paragraph (b) of this section shall be provided on the means of access to and from the floors of graving docks.

(d) Railings approximately 42 inches in height, with a mid rail, shall be provided on the edges of wing walls of floating dry docks and on edges of graving docks. Sections of the railings may be temporarily removed where necessary to permit line handling while a vessel is entering or leaving the dock.

(e) When employees are working on the floor of a floating dry dock where they are exposed to the hazard of falling into the water, the end of the dry dock shall be equipped with portable stanchions and 42 inch railings with a mid rail. When such a railing would be impracticable or ineffective, other effective means shall be provided to prevent men from falling into the water.

(f) Access to wing walls from floors of dry docks shall be by ramps, permanent stairways or ladders meeting the applicable requirements of § 1915.72.

(g) Catwalks on stiles of marine railways shall be no less than 20 inches wide and shall have on at least one side a guardrail and midrail meeting the requirements of § 1915.71(j) (1) and (2).

§ 1915.76 Access to cargo spaces and confined spaces.

The provisions of this section apply to ship repairing, shipbuilding and shipbreaking except that paragraph (a)(4) of this section applies to ship repairing only.

APPENDIX E

1 JULY 1976 12:1

SECTION XII

CONTRACTOR INDUSTRIAL LABOR RELATIONS

12-000 Scope of Section. This Section (i) deals with general policies regarding contractor industrial labor relations, so far as they relate to Government contracts, (ii) sets forth certain pertinent labor laws and requirements, indicating in connection with each its applicability and any procedures thereunder; and (iii) prescribes the contract clauses with respect to each labor law or requirement. Labor standards and clauses which are applicable only to construction contracts are treated separately in Section XVII, Part 7.

12-000

ARMED SERVICES PROCUREMENT REGULATION

1 JULY 1976 12:19

CONTRACTOR INDUSTRIAL LABOR RELATIONS

Part 5 — Safety & Health Regulations for Ship Repairing & Shipbuilding

12-501 Safety and Health Regulations. The Secretary of Labor has promulgated Safety and Health Regulations for Ship Repairing and Shipbuilding pursuant to the authority of Public Law 85-742, 72 Stat. 835 (approved August 23, 1958) amending section 41 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 941). These regulations are set forth in Title 29, Code of Federal Regulations, Subtitle B, Part 1501 and Part 1502.

12-502 Applicability. These regulations apply to ship repair and shipbuilding or related work, as defined therein, performed within the Federal maritime jurisdiction on the navigable waters of the United States, including any dry dock or marine railway.

12-503 Contract Clause. The Master Contract for the Repair and Alteration of Vessels (DD ASPR Form 731) includes a clause entitled "U.S. Department of Labor Safety and Health Regulations for Ship Repairing" directing the attention of the contractor to the applicability of these regulations. Similar clauses should be included in shipbuilding and ship conversion contracts.

12-514 Administration and Enforcement. The responsibility for compliance with the U.S. Department of Labor Regulations is placed upon employers, any of whose employees are engaged in any ship repair, shipbuilding, or related employment aboard any vessel upon the navigable waters of the United States, including any dry dock or marine railway. Consequently, prime contractors or subcontractors, or both, may be responsible for compliance with these regulations. Insofar as the Government is concerned, the responsibility for the administration and enforcement of these regulations is with the U.S. Department of Labor. Contractors or employees who inquire concerning applicability or interpretation of the foregoing regulations shall be advised that rulings concerning such matters fall within the jurisdiction of the U.S. Department of Labor and shall be given the address of the appropriate field office of the Bureau of Labor Standards of the U.S. Department of Labor.

APPENDIX F

GENERAL INDUSTRY SAFETY ORDERS

3273. Working Area.

(a) Permanent floors and platforms shall be free of dangerous projections or obstructions, maintained in good repair, and reasonably free of oil, grease, or water. Where the type of operation necessitates working on slippery floors, such surfaces shall be protected against slipping by using mats, grates, cleats, or other methods which provide equivalent protection. Where wet processes are used drainage shall be maintained and false floors, platforms, mats, or other dry standing places provided.

(b) Permanent roadways, walkways, and material storage areas in yards shall be maintained free of dangerous depressions, obstructions, and debris.

(c) Platforms, runways, ramps, or other elevated working levels, except catwalks, that are 30 inches or more above the floor, ground, or other working area shall be no less than 2 feet wide and have no less than 6½ feet clear headroom. In existing installations where an overhead hazard exists due to clearances of less than 6½ feet above ramps, runways, platforms, or other elevated work areas, such work area shall be relocated and the obstruction removed. If these procedures are impracticable, a suitable warning shall be placed near the obstruction to notify employees of its presence. Where the nature of the hazard is such that padding will increase safety, it shall be installed.

(d) Catwalks shall be no less than 18 inches wide and have 6½ feet clear headroom. When installed along inclined conveyors, crane booms, etc., where because of structural or load conditions it is unreasonable to comply with basic ramp standards, catwalks may have a slope exceeding 18 degrees.

EXCEPTIONS: (1) When required location dictates, a catwalk may have less overhead clearance if a warning and padding are provided as in (c).

(2) In bowling alleys at pin-spotting and pin-setting machines, catwalks shall be no less than nominal 8 inches wide and provided with an adequate handrail if the sides are not protected by another structure.

(e) Where the type of process or operation, exclusive of repair and maintenance, is such that there are hazards to employees from materials falling through platform or runway openings, the openings shall be limited to a size that prevents materials falling through the openings.

(f) Where platform or runway gratings are used as work areas during repair or maintenance, there shall be provided at such areas suitable safeguards to prevent tools or materials falling on employees below. Such safeguards may be netting suspended below the work area, canvas, planking on the surface of the grating, or barricaded or sheltered areas below the work area.

(g) Where it is necessary to lubricate or adjust prime movers, machines, or equipment, which extends below the floor line, sufficient work spaces shall be provided for the safe performance of the work.

(h) Permanently installed prime movers, machines, and equipment shall be located and guarded so that transported material does not strike either the moving parts of machines or the employees at their operating positions.

(i) Machines or equipment shall be located and guarded so that the product, waste stock, or material being worked or processed does not endanger employees.

(j) Where machinery or equipment is installed in a pit and there are shear hazards between the pit edges and parts of the machine or equipment, skirt guards shall be installed to remove such hazards, or such other device used to provide equivalent protection.